**Brusco Tug & Barge, Inc. *and* International Organization of Masters, Mates, & Pilots ILA, AFL–CIO.** Case 19–CA–096559

June 15, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by International Organization of Masters, Mates, & Pilots, ILA, AFL–CIO (the Union) on January 16, 2013, the Acting General Counsel issued the complaint on January 30, 2013, alleging that Brusco Tug & Barge, Inc. (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 19–RC–013872. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 7, 2013, the Acting General Counsel filed a Motion for Summary Judgment and Brief in Support of Motion. On February 13, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On May 20, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 122. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the Board issued an order setting aside the Decision and Order, and retained this case on its docket for further action as appropriate.

On March 18, 2015, the Board (Member Johnson, dissenting) issued a further Decision, Order Affirming Certification of Representative, and Notice to Show Cause in Cases 19–CA–096559 and 19–RC–013872, which is reported at 362 NLRB No. 28. That Decision provided leave to the General Counsel to amend the complaint on or before March 30, 2015, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the March 18, 2015 Order affirming certification of representative issued.

On March 27, 2015, the General Counsel issued an amended complaint, and on April 3, 2015, the Respondent filed an answer to the amended complaint. Thereafter, the General Counsel filed a statement in further support of Motion for Summary Judgment, and the Respondent filed a second brief in response to Notice to Show Cause and in opposition to Motion for Summary Judgment.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its contention, raised and rejected in the underlying representation proceeding, that the mates in the unit are supervisors under Section 2(11) of the Act and that the bargaining unit is therefore inappropriate. The Respondent also argues that the complaint was not validly issued because the Acting General Counsel was not a proper recess appointee.[2]

In addition, in its responses to the Notices to Show Cause, the Respondent contends that the duties of its mates were changed in about 2010, after the Board

[1] The amended complaint adds "March 18, 2015," as the date the Board reaffirmed its certification of the Union as the exclusive collective-bargaining representative of the unit employees, alleges in relevant part that about January 15, 2013, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees and that since about January 16, 2013, the Respondent has refused to do so. The amended complaint further alleges that about March 19, 2015, the Union again requested bargaining and about March 25, 2015, the Respondent declined to recognize and bargain with it. The amended answer admits the factual allegations of the complaint, incorporates by reference the arguments made in the underlying representation proceeding, and argues generally that due to the passage of time and changed circumstances the amended complaint should be dismissed.

[2] The Respondent is incorrect in asserting that the Acting General Counsel was a recess appointee. Rather, the Acting General Counsel was designated by the President pursuant to the Federal Vacancies Reform Act, 5 U.S.C. 3345, et seq. For the reasons stated in *Newark Electric Corp.*, 362 NLRB No. 44, slip op. at 1 fn. 1 (2015), the Acting General Counsel was fully authorized to prosecute the complaint in this matter. In any event, the current General Counsel, who was appointed by the President with the advice and consent of the Senate, unquestionably is authorized to prosecute this case.

granted the Employer's request for review of the Regional Director's second supplemental decision but before the Board's Decision on Review issued. The Respondent asserts that these changes could not have been litigated in the prior representation proceeding because they occurred after 2006, the last opportunity afforded by the Regional Director to submit evidence, and that it should now be permitted to present these facts at a hearing. We find no merit in this argument. The Respondent's attempt to raise alleged changes in mates' duties in this proceeding is procedurally improper. As indicated, the alleged changes occurred *before* the Board issued its Decision on Review affirming the Regional Director's determination that the mates were employees under the Act. Although the Respondent's request for review had been granted and the matter was pending before the Board, the Respondent could have filed a motion to reopen the record. The Respondent did not timely file such a motion, however, or make any other timely effort to bring the alleged changes to the Board's attention.[3] Thus, the Respondent is improperly attempting to litigate an issue that could have been litigated in the representation proceeding had it been timely raised.[4]

The Respondent additionally contends that the exceedingly long passage of time since the certification in 2000 constitutes a "special circumstance" warranting relitigation of the issues raised in the underlying representation case. In this regard, the Respondent contends that there has been significant employee turnover, such that only 2 employees remain of the 39 employees who were in the putative unit in 2000.[5] The Respondent also argues that under the equitable doctrine of laches, the certification should not be upheld because the Board did not expeditiously resolve the representation case.[6] There is no merit in these arguments.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[7]

Accordingly, we grant the Motion for Summary Judgment.[8]

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[3] In its March 18, 2015 decision, the Board rejected the Respondent's untimely proffer of this evidence, finding that the Respondent had failed to act "promptly on discovery of the evidence sought to be adduced" or to "provide good cause for that failure." 362 NLRB No. 28, slip op. at 1.

[4] See *East Michigan Care Corp.*, 246 NLRB 458, 459 (1979), enfd. 655 F.2d 721 (6th Cir. 1981) (refusing to consider precertification changes to nurses' duties that allegedly made them supervisors where the employer did not seek to introduce evidence of those changes in the representation proceeding by a motion to reopen the record or otherwise); accord *TEG/LVI Environmental Services*, 328 NLRB 483, 483 fn. 3 (1999) (observing that employer had failed to explain why asserted change affecting unit was first brought to the Board's attention in the employer's response to the notice to show cause).

[5] Although the delay in this case is regrettable, the Board's bargaining orders have been enforced in similar cases by courts which have noted that changed circumstances during intervals of adjudication "have been held irrelevant to the adjudication of enforcement proceedings." *NLRB v. Bakers of Paris, Inc.*, 929 F.2d 1427, 1448 (9th Cir. 1991) (citing *NLRB v. Buckley Broadcasting Corp.,* 891 F.2d 230, 234–235 (9th Cir. 1989), cert. denied 496 U.S. 925 (1990)); see also *East Bay Automotive Council v. NLRB,* 483 F.3d 628, 635 (9th Cir. 2007); *NLRB v. Best Products Co.,* 765 F.2d 903, 914 (9th Cir. 1985). Similarly, the Board has uniformly held that employee turnover does not constitute "unusual circumstances" relieving an employer of its obligation to bargain. *Specialty Healthcare & Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174, slip op. at 1 fn. 2 (2011), enfd. 727 F.3d 552 (6th Cir. 2013), citing *King Electric, Inc.,* 343 NLRB No. 54, slip op. at 1 fn. 1 (2004) (not reported in Board volumes), enf. denied on other grounds 440 F.3d 471, 474 (D.C. Cir. 2006); *Action Automotive,* 284 NLRB 251, 251 fn. 1 (1987), enfd. 853 F.2d 433 (6th Cir. 1988), cert. denied 488 U.S. 1041 (1989); *Murphy Bros.,* 265 NLRB 1574, 1575 fn. 3 (1982); see also *Pearson Education Inc. v. NLRB*, 373 F.3d 127, 132–133 (D.C. Cir. 2004) (apart from bargaining orders in *Gissel* context, employee turnover does not affect ongoing validity of Board bargaining order), cert. denied 543 U.S. 1131 (2005); *Scepter, Inc., v. NLRB,* 280 F.3d 1053, 1057 (D.C. Cir. 2002) (simple fact of employee turnover would not have been enough to require a different decision by Board).

[6] This defense has no merit. The Board and the courts have long held that the defense of laches does not lie against the Board as an agency of the United States Government. *Entergy Mississippi, Inc.,* 361 NLRB No. 89, slip op. at 2 fn. 5 (2014), citing *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258 (1969); see *NLRB v. Quinn Restaurant Corp.,* 14 F.3d 811, 817 (2d Cir. 1994). Member Johnson adheres to the view that there may be exceptional cases in which a defense of laches will lie against the Board's inordinate delay in commencement of a proceeding, but that doctrine does not easily apply here. See *Midwest Terminals of Toledo International*, 362 NLRB No. 57, slip op. at 1 fn. 1 (2015). He also finds that the overall 15-year delay in the processing of this case is not just "regrettable." It raises a serious question whether enforcement of a bargaining order based on the original election vote will accurately reflect employees' free choice on representation. Nevertheless, in the absence of a three-member majority to reconsider Board precedent on this point, he agrees to apply that precedent for institutional purposes.

[7] For the reasons set forth in his dissent to the Board's March 18, 2015 decision, Member Johnson would have reversed the Regional Director on review in the underlying representation proceeding and found that the mates in the petitioned-for bargaining unit are supervisors within the meaning of Sec. 2(11). He ultimately agrees, however, that the Respondent has not raised any new matters that are properly litigable in this unfair labor practice proceeding, and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

[8] The Respondent's request that the complaint be dismissed, and the certification of representative be revoked, is therefore denied.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a State of Washington corporation with an office and a place of business located in Longview, Washington (the facility), is engaged in the business of operating inland and offshore tugboats on the west coast of the United States.

During the 12-month period preceding issuance of the complaint, a representative period, the Respondent, in conducting its business operations, derived gross revenues in excess of $50,000 for the transportation of freight from the State of Washington directly to points outside the State of Washington, and purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. The Certification*

On September 22, 2000, in Case 19–RC–013872, the Board certified the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All mates, deckhands, and engineer deckhands employed by the Employer on vessels operated by the Employer out of its Longview/Cathlamet, Washington, home port; excluding all guards and supervisors as defined by the Act, including all captains and all other employees.

On October 24, 2001, the Board remanded Case 19–RC–013872 to reopen the record. On December 14, 2012, after two postremand supplemental decisions, the Board affirmed the Second Supplemental Decision in Case 19–RC–013872, finding the unit appropriate. On January 11, 2013, the Regional Director for Region 19 issued an order reaffirming the Certification of Representative issued in Case 19–RC–013872, and on March 18, 2015, the Board issued an order reaffirming the Certification of Representative in that proceeding. The Union continues to be the exclusive collective-bargaining representative of the unit under Section 9(a) of the Act.

#### *B. Refusal to Bargain*

About January 15, 2013 and March 19, 2015, the Union requested in writing that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit. About January 16, 2013, and March 25, 2015, the Respondent, in writing by its unnamed agent, informed the Union that it would not bargain with it as the bargaining representative of the unit. Since about January 16, 2013, and continuing to date, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal to recognize and bargain with the Union constitutes a violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.[9]

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); accord *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

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[9] In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

> Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

No party has raised this issue, and we find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

ORDER

The National Labor Relations Board orders that the Respondent, Brusco Tug & Barge, Inc., Longview, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with International Organization of Masters, Mates, & Pilots, ILA, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All mates, deckhands, and engineer deckhands employed by the Employer on vessels operated by the Employer out of its Longview/Cathlamet, Washington, home port; excluding all guards and supervisors as defined by the Act, including all captains and all other employees.

(b) Within 14 days after service by the Region, post at its facility in Longview, Washington, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since about January 16, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 2015

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Harry I. Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with International Organization of Masters, Mates, & Pilots ILA, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

conditions of employment for our employees in the following bargaining unit:

> All mates, deckhands, and engineer deckhands employed by us on vessels operated by us out of our Longview/Cathlamet, Washington, home port; excluding all guards and supervisors as defined by the Act, including all captains and all other employees.

BRUSCO TUG & BARGE, INC.

The Board's decision can be found at www.nlrb.gov/case/19–CA–096559 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.